## Case 3:16-cv-05420 Document 1 Filed 09/22/16 Page 1 of 40

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15   16   17   18   19   20   21   22   23   24   25	SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION,  Plaintiff,  v.  UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL TODD T. SEMONITE, IN HIS OFFICIAL CAPACITY; LIEUTENANT COLONEL JOHN C. MORROW, IN HIS OFFICIAL CAPACITY; AND JO ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS, IN HER OFFICIAL CAPACITY,  Defendants.	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF  (Coastal Zone Management Act, 16 U.S.C. § 1451 et seq.; 33 C.F.R. Parts 335-338; and Administrative Procedure Act, 5 U.S.C. § 551, 701 et seq.)
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		Complaint for Declaratory and Injunctive Relief

Plaintiff San Francisco Bay Conservation and Development Commission alleges as follows: INTRODUCTION

- 1. Plaintiff San Francisco Bay Conservation and Development Commission (Commission) brings this action against defendants the United States Army Corps of Engineers (Corps); Lieutenant General Todd T. Semonite, Chief Engineer and Commanding General of the Corps; and Lieutenant Colonel John C. Morrow, District Engineer of the San Francisco District of the Corps and Jo Ellen Darcy, Assistant Secretary of the Army for Civil Works (collectively, "Federal Defendants") to require Federal Defendants to comply with the federal Coastal Zone Management Act (CZMA) and its implementing regulations, the Corps' own dredging regulations, 33 C.F.R. Parts 335-338 (Corps Dredging Regulations), and the federal Administrative Procedure Act (APA) in conducting maintenance dredging activities of the federal deep draft navigation channels in San Francisco Bay (the Bay) from now through the end of federal fiscal year 2017.
  - 2. The CZMA and the Corps Dredging Regulations require Federal Defendants' maintenance dredging of the federal navigation channels in the Bay and management of associated dredged material to be consistent to the maximum extent practicable with the enforceable policies of the state's federally-approved coastal zone management program (state coastal program). The San Francisco Bay Plan (Bay Plan) and McAteer-Petris Act (Cal. Gov. Code §§ 66600, *et seq.*) are a portion of the San Francisco Bay segment of California's federally-approved coastal program that is administered by the Commission (Commission Program).
  - 3. In order to satisfy the CZMA's federal consistency requirement, prior to engaging in maintenance dredging activities in the Bay, the Corps is required to submit a determination to the Commission demonstrating that such activities will be consistent to the maximum extent practicable with the enforceable policies of the Commission Program. The CZMA requires the Commission to concur, conditionally concur or object to the Corps' determination. The CZMA requires Federal Defendants to comply with any conditions imposed by the Commission to ensure consistency with the Commission Program unless they are legally prohibited from doing so.

1	4. In March and April of 2015, Federal Defendants submitted an initial and a supplemental
2	and revised consistency determination (hereafter "Consistency Determinations") to the
3	Commission for maintenance dredging of the deep draft navigation channels in the Bay for fiscal
4	years 2015-2017. These channels are: Oakland Harbor, Richmond Harbor, Redwood City
5	Harbor, Pinole Shoal Channel, Suisun Bay Channel/New York Slough, and the San Francisco
6	Main Ship Channel (which is outside the Bay and the Commission's jurisdiction).
7	5. Federal Defendants' Consistency Determinations proposed dumping of dredged material at
8	unconfined disposal sites in the Bay and along San Francisco's ocean shoreline and at a federally-
9	designated deep ocean disposal site. The Consistency Determinations also gave Federal
10	Defendants complete discretion as to the manner of dredging, including unrestricted use of
11	hydraulic (hopper) dredges, which Federal Defendants have admitted take (e.g. kill) delta smelt,
12	longfin smelt, and other native aquatic species. Delta smelt are listed as threatened under federal
13	Endangered Species Acts (ESA) and endangered under the state ESA, and longfin smelt are a
14	candidate for listing under the federal ESA and listed as threatened under the state ESA.
15	6. Federal Defendants' proposed dredging is inconsistent with the enforceable policies of the
16	Commission Program, which requires, inter alia: 1) maximal beneficial reuse of dredged material
17	as a resource to create and maintain levees and dikes, to create, enhance and restore tidal marshes
18	and wetlands, to cover and seal sanitary landfills, and as fill in construction projects; 2) reduction
19	of in-Bay disposal of dredged materials; 3) preservation of and avoidance of harm to the Bay's
20	fish and wildlife resources and their habitat; and 4) protection of water quality, including
21	designated beneficial uses, in the Bay. Bay Plan Dredging Findings and Policies 1-3, 5; Bay Plan
22	Fish, Other Aquatic Organisms and Wildlife (Fish and Wildlife) Findings and Policies 1 and 2;
23	Bay Plan Subtidal Areas Findings and Policy 1; Bay Plan Mitigation Findings and Policy 1; Bay
24	Plan Water Quality Findings and Policy 2; Cal. Gov. Code §§ 66600-66605, 66663.1, 66663.2.
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<sup>&</sup>lt;sup>1</sup> Federal Defendants originally submitted a consistency determination in February 2015 for maintenance dredging of the federal deep draft navigation channels in the Bay for fiscal years 2015-2024. At the Commission staff's request, Federal Defendants subsequently submitted a consistency determination for fiscal years 2015-2017.

1	7. The Commission conditionally concurred in Federal Defendants' Consistency
2	Determinations in a Letter of Agreement dated June 15, 2015, imposing a number of special
3	conditions designed to ensure that Federal Defendants' dredging activities would be consistent
4	with the enforceable policies of the Commission Program to the maximum extent practicable.
5	Defendant Morrow signed the Commission's conditional concurrence Letter of Agreement on
6	behalf of the Corps on June 23, 2015. However, on November 10, 2015, Federal Defendants
7	belatedly reversed course and notified the Commission that they would not comply with four of
8	those conditions (the "Contested Conditions").
9	8. The four Contested Conditions require the Corps to: 1) beneficially reuse a minimum of
10	40% of dredged material for wetland restoration and other beneficial projects and dispose of a
11	maximum of 20% of dredged material in the Bay, commencing in calendar year 2017; 2) reduce
12	the use of hydraulic (hopper) dredging equipment to prevent killing of delta smelt and longfin
13	smelt, commencing in federal fiscal year 2017; 3) seek additional funding, if necessary, to
14	implement the foregoing two conditions; and 4) obtain a Clean Water Act (CWA) Section 401
15	water quality certification for the Corps' dredging activities from the San Francisco Bay Regional
16	Water Quality Control Board (Regional Board).
17	9. The Contested Conditions are critical for ensuring consistency with the Commission
18	Program's enforceable policies pertaining to dredging and protection of the Bay's fish and
19	wildlife resources and their habitat and water quality, and for preventing undue environmental
20	harm to the land and water uses and natural resources of the Bay. Maximizing beneficial reuse
21	and reducing unconfined disposal of dredged sediment in the Bay as required by, inter alia, Bay
22	Plan Dredging Policies 1 and 5 is important because the Bay is now in a period of sediment
23	supply decline, and rising sea levels due to climate change have increased the need for the
24	resiliency of Bay tidal marshes and associated habitat through tidal marsh and wetlands
25	restoration projects.
26	10. In addition, protecting and avoiding harm to the Bay's endemic fish species and their
27	habitat as required by, inter alia, Bay Plan Fish and Wildlife Policies 1 and 2 is important because
28	"[flish_other aquatic organisms and wildlifeprovide food_economic gain_and recreation" and

1	"are a resource for scientific research and education," among other benefits. Bay Plan Fish and
2	Wildlife Finding C. Delta smelt, in particular, are literally on the brink of extinction and require
3	implementation of all reasonable and necessary protection measures in order to prevent complete
4	extirpation of this species, and longfin smelt are also highly imperiled.
5	11. Federal Defendants are not legally prohibited from implementing any of the Contested
6	Conditions by any statute or regulation and in fact are legally required to implement the
7	Contested Conditions under the CZMA and its implementing regulations and the Corps Dredging
8	Regulations. The Corps Dredging Regulations require all dredging to be conducted in an
9	"environmentally acceptable" manner that satisfies the disposal criteria of CWA regulations
10	referred to the Section 404(b)(1) Guidelines, and the provisions of other federal laws, including
11	the CZMA. 33 C.F.R. §§ 335.2, 335.7, 336.1(a), (b)(4), (8)-(9), (c).
12	12. In violation of the CZMA and its implementing regulations, the Corps Dredging
13	Regulations, and the APA, Federal Defendants have arbitrarily and capriciously determined that
14	they will not beneficially reuse any dredged material and instead will dump it in unconfined
15	disposal sites in the Bay and the ocean, and will continue unrestricted use of hydraulic dredging
16	equipment that kills delta smelt and longfin smelt. In making this decision, Federal Defendants
17	rely on a gross misreading of the CZMA and the Corps Dredging Regulations, asserting that the
18	least-cost, less environmentally protective alternative is the only alternative that Federal
19	Defendants are legally authorized to implement under the so-called "Federal Standard" policy in
20	the Corps Dredging Regulations.
21	13. Federal Defendants refuse to pay or even attempt to seek additional funds for any dredging
22	alternative that is allegedly more expensive than Federal Defendants' preferred least-cost option
23	of simply dumping dredged material in the Bay or the ocean and continuing unrestricted use of
24	hydraulic dredging equipment, which they incorrectly claim is required by the Federal Standard.
25	14. Federal Defendants erroneously assert that they are not legally permitted to comply with
26	purportedly more costly but more environmentally protective alternatives, which require dredged
27	material to be re-used for wetlands restoration and other beneficial purposes and that avoid or
28	reduce the impacts on endangered and threatened fish. Federal Defendants claim that they can

1	only implement the Contested Conditions if the Commission or some other state entity pays for
2	Federal Defendants' duties to comply with federal environmental laws by committing to pay the
3	cost differential between Federal Defendants' less environmentally protective but purportedly less
4	costly alternative and the Contested Conditions.
5	15. By this complaint, the Commission requests that this Court declare these actions of Federal
6	Defendants to be arbitrary, capricious, an abuse of discretion and otherwise not in accordance
7	with the law and require Federal Defendants to implement maintenance dredging of the Bay's
8	federal navigation channels and manage dredged material in compliance with all special
9	conditions in the Commission's June 15, 2015 conditional concurrence Letter of Agreement.
10	PARTIES
11	16. Plaintiff San Francisco Bay Conservation and Development Commission (Commission) is
12	an agency of the State of California created by the McAteer-Petris Act of 1965. Cal. Gov. Code
13	§§ 66600, et seq. Under the McAteer-Petris Act and the Suisun Marsh Preservation Act (Cal.
14	Pub. Res. Code §§ 29000, et seq.) the Commission has planning and regulatory authority over the
15	Bay, its shoreline band, and Suisun Marsh. The Commission is the designated state coastal zone
16	management agency under the CZMA for the San Francisco Bay portion of California's coastal
17	zone, and is responsible for adopting, amending and implementing the Bay Plan and for
18	implementing and enforcing the McAteer-Petris Act and the Suisun Marsh Preservation Act, the
19	portion of the state's federally-approved coastal zone management program applicable to the Bay
20	(Commission Program). 16 U.S.C. § 1455(d)(6). As such, the Commission has authority to
21	determine whether federal agency activities are consistent with the enforceable policies of the

regulations. The Commission also has the power to sue. Cal. Gov. Code § 66633(d). Defendant United States Army Corps of Engineers (Corps) is an agency of the United States and a subdivision of the United States Department of the Army, which is in the United

Commission Program to the maximum extent practicable under the CZMA and its implementing

States Department of Defense. The Corps is responsible for, among other things, protecting the

nation's rivers and harbors in a manner that meets all environmental standards and requirements and for conducting maintenance dredging of the federal navigation channels of the United States

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1	to maintain the navigability of the channels to the Congressionally-authorized maximum depth or
2	a lesser regulatory depth. Specifically, the Corps is responsible for the maintenance dredging and
3	associated dredged material management for the deep draft navigation channels in the Bay.
4	18. Defendant Lieutenant General Todd T. Semonite is the Chief of Engineers and the
5	Commanding General of the Corps, and is the federal official responsible for overseeing and
6	directing the operations of the Corps, including maintenance dredging of federal navigation
7	channels of the United States to maintain the navigability of the channels. Defendant Semonite is
8	sued in his official capacity and bears responsibility, in whole or in part, for the acts complained
9	of in this complaint.
10	19. Defendant Lieutenant Colonel John C. Morrow is the District Engineer of the San Francisco
11	District of the Corps and is responsible for overseeing and directing the operations of the San
12	Francisco District of the Corps. The San Francisco District is the district of the Corps responsible
13	for conducting maintenance dredging of the federal navigation channels in the Bay to maintain
14	the navigability of the channels. Defendant Morrow is sued in his official capacity and bears
15	responsibility, in whole or in part, for the acts complained of in this complaint.
16	20. Defendant Jo Ellen Darcy is Assistant Secretary for Civil Works in the United States
17	Department of the Army, and is responsible for establishing policy direction and providing
18	supervision for the Department of the Army's functions relating to all aspects of the Corps' Civil
19	Works program. Ms. Darcy's responsibilities include programs for conservation and
20	development of the nation's water and wetland resources, flood control, navigation, and shoreline
21	protection. Defendant Darcy is sued in her official capacity and bears responsibility, in whole or
22	in part, for the acts complained of in this complaint.
23	JURISDICTION AND VENUE
24	21. This action arises under the federal Coastal Zone Management Act, 16 U.S.C. § 1451 et
25	seq. (CZMA) and its implementing regulations, 15 C.F.R. Part 930; the Corps Dredging
26	Regulations, 33 C.F.R. Parts 335-338; and the Administrative Procedure Act, 5 U.S.C. §§ 551,
27	701 et seq. (APA), and is brought against a federal agency of the United States. Accordingly, this
28	court has jurisdiction over the action under 28 U.S.C. 88 1331, 1346(a)(2) and 1361

26	Coastal Zone Management Act
25	LEGAL BACKGROUND
24	is the subject of this action is situated.
23	the events and omissions giving rise to the claims herein occurred and in which the property that
22	case under 28 U.S.C. § 1391(b) and (e)(1) because it is the district in which a substantial part of
21	26. The United States District Court, Northern District of California is the proper venue for this
20	pursuant to the CZMA's implementing regulations, 15 C.F.R. Part 930, Subpart G.
19	bringing this action, including requesting that the Secretary of Commerce mediate this dispute
18	25. The Commission has exhausted all available legal remedies under the CZMA prior to
17	of the United States Constitution. As such, the Commission has standing to bring this action.
16	and injured by Federal Defendants' actions within the meaning of 5 U.S.C. § 702 and Article III
15	24. The Commission has suffered a legal wrong and has been adversely affected and aggrieved
14	management agency under the CZMA.
13	activities in the Bay pursuant to the Commission's authority as a designated coastal zone
12	the Contested Conditions, four conditions that the Commission imposed on their dredging
11	because Federal Defendants have finally and unequivocally stated that they will not comply with
10	to challenge Federal Defendants' final agency action. This case is ripe for judicial review
9	review under 5 U.S.C. § 704. The Commission has no other adequate judicial remedy by which
8	conditional concurrence Letter of Agreement constitutes final agency action subject to judicial
7	23. Federal Defendants' decision to refuse to comply the Commission's June 15, 2015
6	Justice Act, 28 U.S.C. § 2412.
5	Commission also is entitled to an award of costs and attorney fees pursuant to the Equal Access to
4	officials of the United States, including defendants. 5 U.S.C. §§ 701(b)(1), 702. The
3	§§ 2201(a) and 2202. The APA waives sovereign immunity for lawsuits against agencies and
2	authority to grant declaratory and injunctive relief under 5 U.S.C. §§ 705 and 706 and 28 U.S.C.
1	22. An actual, present and justiciable controversy exists between the parties, and this Court has

program (state coastal program) to the Secretary of Commerce, acting through the federal Office 7

The CZMA permits a coastal state to submit for approval its state coastal zone management

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1 of Coastal Management (OCM) within the National Oceanic and Atmospheric Administration. 2 16 U.S.C. § 1454. OCM approval of a state coastal program provides a federally-authorized 3 vehicle for state regulation and protection of the land and water uses and natural resources in the 4 state's coastal zone. Such programs must meet certain stringent requirements in order to be 5 approved. See 16 U.S.C. § 1455(d); 15 C.F.R. Part 923. 6 Once OCM approves a state coastal program, the CZMA requires, inter alia, all federal 7 agency activities that affect any land or water use or natural resource in the coastal zone to be 8 "carried out in a manner which is consistent to the maximum extent practicable with the 9 enforceable policies" of that program. 16 U.S.C. § 1456(c)(1)(A). "Federal agency activities" 10 include all activities initiated by a federal agency that may foreseeably affect coastal resources. 11 15 C.F.R. § 930.31(a). 12 The CZMA requires each federal agency that proposes to carry out an activity that may 13 affect any land or water use or natural resource in the coastal zone to provide a "consistency 14 determination" to the designated state coastal zone management agency (state coastal agency --15 here, the Commission) at least ninety days prior to the federal agency's approval of the activity. 16 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36(b)(1). The consistency determination must 17 explain whether and how the proposed federal activity is "consistent to the maximum extent 18 practicable" with the "enforceable policies" of the federally-approved state coastal program. 15 19 C.F.R. § 930.36(a), 930.39(a), (c), (e). 20 "Consistent to the maximum extent practicable" means "fully consistent with the 21 enforceable policies of management programs unless full consistency is prohibited by existing 22 law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1). "Enforceable policies" are 23 "[s]tate policies which are legally binding through constitutional provisions, law, regulations, 24 land use plans, ordinances, or judicial or administrative decisions, by which State exerts control 25 over private and public land and water uses and natural resources in the coastal zone." 16 U.S.C. 26 § 1453(6a); 15 C.F.R. § 930.11(h). 27 The CZMA and its implementing regulations explicitly prohibit reliance on a lack of funds

as a criterion for determining inconsistency with a state coastal program. See 16 U.S.C. §

1	1456(c)(1)(B) ("[n]o exemption [from the CZMA's consistency requirement] shall be granted
2	on the basis of a lack of appropriations unless the President has specifically requested such
3	appropriations as part of the budgetary process and the Congress has failed to make [them]
4	available"); 15 CFR § 930.32(a)(3) ("[t]he only circumstance where a Federal agency may rely on
5	a lack of funding as a limitation on being fully consistent with an enforceable policy is the
6	Presidential exemption").
7	32. The state coastal agency has sixty days to concur, conditionally concur, or object to the
8	federal agency's consistency determination. 15 C.F.R. § 930.41(a). If a state coastal agency
9	conditionally concurs in a consistency determination, and the federal agency does not agree to
10	comply with the conditions, then the state coastal agency's conditional concurrence is treated as
11	an objection to the federal agency activity. 15 C.F.R. § 930.4(b).
12	33. If the state and federal agency cannot resolve their differences within the time remaining of
13	the initial ninety-day period, then the federal agency may not proceed with the activity unless the
14	federal agency finds that: 1) consistency with the enforceable policies of the state's coastal
15	program "is prohibited by existing law applicable to the federal agency" and the federal agency
16	has "clearly described, in writing, to the State agency the legal impediments to full consistency;"
17	or 2) its proposed action is fully consistent with the state coastal program notwithstanding the

#### **Clean Water Act**

state's objections. 15 C.F.R. § 930.43(d).

- Corps dredging projects for maintenance of federal navigation channels also are subject to applicable provisions of the CWA, 33 U.S.C. § 1251 et seq., particularly sections 401 and 404 of the CWA, 33 U.S.C. §§ 1341 and 1344, and the section 404 implementing regulations adopted by the U.S. Environmental Protection Agency (EPA), 40 C.F.R. Part 230 (commonly referred to as the CWA "Section 404(b)(1) Guidelines").
- Section 404 of the CWA requires any person to obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharge of dredged or fill material into navigable waters of the United States. 33 U.S.C. § 1344(a), (d). The criteria for issuance of such

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1	permits are set forth in pertinent part in the Section 404(b)(1) Guidelines. 33 U.S.C. §
2	1344(b)(1); 40 C.F.R. Part 230.
3	36. Section 401 of the CWA provides that any applicant for a federal license or permit to
4	conduct any activity which may result in any discharge into navigable waters of the United States
5	must provide a certification from the state that the proposed discharge complies with specified
6	provisions of the CWA. 33 U.S.C. §§ 1323(a), 1341(a), 1344(t); 33 C.F.R. § 336.1(a)(1). Such
7	certification is commonly referred to as a CWA "Section 401 certification."
8	Corps Dredging Regulations
9	37. Corps dredging projects for maintenance of federal navigation channels also are subject to
10	the Corps Dredging Regulations, entitled "Operation and Maintenance of Army Corps of
11	Engineers Civil Works Projects Involving the Discharge of Dredged or Fill Materials Into Waters
12	of the United States or Ocean Waters," 33 C.F.R. Parts 335-338. These regulations provide that,
13	while "the Corps does not issue itself a CWA permit to authorize Corps discharge of dredged
14	material or fill material into U.S. waters," it "does apply the 404(b)(1) guidelines and other
15	substantive requirements of the CWA and other environmental laws," including the CZMA. 33
16	C.F.R. § 335.2; see also 33 C.F.R. § 336.1(a).
17	38. The Corps Dredging Regulations also provide that: 1) "[t]he CWA requires the Corps to
18	seek water quality certification for discharges of dredged or fill material into waters of the U.S.";
19	and 2) "[s]ection 307 of the CZMA requires that certain activities that a Federal agency
20	conducts or supports be consistent with the Federally-approved state management plan to the
21	maximum extent practicable." 33 C.F.R. § 336.1(a); see also 33 C.F.R. § 336.1(b)(8)-(9).
22	39. The Corps Dredging Regulations further provide that:
23	[i]t is the Corps' policy to regulate the discharge of dredged material from its projects
24	to assure that dredged material disposal occurs in the least costly, environmentally acceptable manner, consistent with engineering requirements established for the
25	project. The environmental assessment or environmental impact statement, in conjunction with the section 404(b)(1) guidelines and public notice coordination
26	process, can be used as a guide in formulating environmentally acceptable alternatives. The least costly alternative, consistent with sound engineering practices
27	and selected through the 404(b)(1) guidelines or ocean disposal criteria, will be designated the Federal standard for the proposed project.

33 C.F.R.  $\S$  336.1(c)(1). This policy is commonly referred to as the "Federal Standard."

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40. The Corps is required to fully consider all practicable and reasonable alternatives on an equal basis. 33 C.F.R. § 335.4. **Administrative Procedure Act** The APA, 5 U.S.C. §§ 551, 701, et seq., provides that judicial review is appropriate if an individual or entity has suffered a legal wrong because of a federal agency action, or has been adversely affected or aggrieved by a federal agency action. 5 U.S.C. §§ 551(2), 702. Section 551 of the APA defines "agency action" to include "the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or [agency] failure to act." 5 U.S.C. § 551(13). Agency actions are subject to judicial review under the APA if they are final agency actions. 5 U.S.C. § 704. 42. A reviewing court can, pursuant to the APA, compel agency action unlawfully withheld or unreasonably delayed, or set aside agency action, findings, or conclusions if they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or without observance of the procedure required by law, among other things. 5 U.S.C. § 706. **FACTUAL ALLEGATIONS** Environmental and Economic Importance of San Francisco Bay

43. San Francisco Bay is the nation's second largest estuary and the most important estuary on the Pacific Coast, both for the habitat it provides for fish and wildlife and for the many recreational benefits it offers the Bay Area's 7.5 million residents, as well as visitors from around the country and world. The Bay estuary's significant ecological value lies in the subtidal Bay, tidal marshes, wetlands, and sloughs along its edges, and in the riparian habitats of the streams and rivers feeding into it. The Bay and its shoreline habitats support abundant fish and wildlife, are the nursery for many commercial and recreational fisheries, and host millions of migratory birds every year as they move up and down the Pacific Flyway. The Bay and its shoreline habitats also provide clean water, open space for a broad range of recreational opportunities, and flood protection. Today, management of the Bay and its shores must account for a future of rising sea levels and more extreme weather events, while continuing to address the challenges of a growing urban population.

1	44. The Bay is one of the world's great natural harbors, and maritime commerce through the
2	Bay Area's five ports — Oakland, San Francisco, Redwood City, Richmond, and Benicia — is of
3	primary importance to the entire economy of the Bay area and the nation. Cargo ships and
4	tankers from around the Pacific Rim depend on these ports and their associated infrastructure to
5	transport goods to and from inland California and other areas of the West Coast of the United
6	States. The Port of Oakland is the fourth largest and fifth busiest port in the United States, and
7	handles more than 99% of the ocean containers passing through Northern California. In 2015, the
8	Port of Oakland both imported and exported 6.8 million metric tons of cargo (for a total
9	throughout of 13.6 million metric tons) while supporting approximately 73,000 jobs in the region.
10	The other Bay Area ports, while smaller, transport substantial additional cargo tonnage and
11	support thousands of additional jobs, and the Port of San Francisco also handles millions of cruise
12	ship and ferry passengers annually.
13	45. The Corps estimates that approximately 8,000-10,000 vessel trips are made on the Bay's
14	federal deep-draft navigation channels each year. April 2015 Consistency Determination
15	Addendum at 24. The Corps also estimates that the goods-movement industry accounts for 51%
16	of the total regional economic output and 32% of the regional employment. "Bay Area ports and
17	harbors play a major role in efficient movement of goods throughout the region, as well as in
18	California and the West Coast of the United States." <i>Id.</i> at 25.
19	46. Maintaining safe and efficient navigation in the Bay is one of the overarching goals of the
20	Bay Plan. "It is the [Corps'] primary mission to maintain safe navigation of its channels, and
21	maintenance dredging of the federal deep-draft navigation channels is vital to ensuring safe and
22	efficient movement of goods to any from Bay Area ports and harbors." April 2015 Consistency
23	Determination Addendum at 24. Such maintenance dredging is also vital to the Bay Area's
24	economy, since it provides navigation access to and from the Bay Area's ports and harbors. Id. at
25	25-26.
26	San Francisco Bay Segment of California's State Coastal Program
27	47. In 1969, the Commission prepared, and the California Legislature adopted, the San
28	Francisco Bay Plan (Bay Plan). The Bay Plan is "a comprehensive and enforceable plan for the

1	conservation of the water[s] of the bay and the development of its shoreline." Cal. Gov. Code §
2	66603; see also Cal. Gov. Code § 66651. On February 16, 1977, OCM approved the entirety of
3	the Bay Plan as part of California's state coastal program, along with the McAteer-Petris Act,
4	Suisun Marsh Preservation Act and certain other state laws and Commission plans. These laws
5	and plans are collectively referred to as the San Francisco Bay Segment of California's federally-
6	approved state coastal program (Commission Program).
7	48. The Bay Plan and McAteer-Petris Act contain numerous enforceable policies regarding the
8	importance of and public interest in: 1) preventing uncoordinated and haphazard filling of the
9	Bay; 2) encouraging beneficial reuse of dredged sediment and discouraging unconfined in-Bay
10	disposal of sediment; and 3) protecting the Bay and its land and water uses and natural resources,
11	including fisheries and water quality. See Bay Plan Fish and Wildlife, Subtidal Areas, Dredging,
12	Water Quality, and Mitigation Findings and Policies; Cal. Gov. Code §§ 66600-66605, 66663.1,
13	66663.2.
14	Long Term Management Strategy for Placement of Dredged Materials in the Bay
15	49. In 1990, the Corps, the EPA, the Commission, the Regional Board and the California State
16	Water Resources Control Board (hereafter collectively referred to as the "LTMS agencies")
17	joined together in a cooperative effort to establish a comprehensive Long-Term Management
18	Strategy for the Placement of Dredged Material in the San Francisco Bay Region (LTMS). The
19	LTMS is designed to produce a long-range approach to meeting the San Francisco Bay Region's
20	dredging and disposal needs over the next fifty years.
21	50. The LTMS sets forth the following overarching goals: 1) maintain in an economically and
22	environmentally sound manner channels necessary for navigation and eliminate unnecessary
23	dredging activities in the Bay and Estuary; 2) conduct dredged material disposal in the most
24	environmentally sound manner; 3) maximize the use of dredged material as a resource; and 4)
25	establish a cooperative permitting framework for dredging and dredged material disposal
26	applications.
27	51. In October 1998, the LTMS agencies published a final LTMS Policy Environmental Impact

Statement/Program Environmental Impact Report (LTMS EIS/EIR) under the National

1	Environmental Policy Act and California Environmental Quality Act. The final LTMS EIS/EIR
2	selected Alternative 3 as the environmentally preferred alternative, which provides for a
3	maximum of 20% in-Bay disposal, a maximum of 40% ocean disposal, and a minimum of 40%
4	upland/wetland beneficial reuse of dredged materials.
5	52. In July 1999, the Corps and the EPA signed a federal Record of Decision (ROD) for the
6	LTMS, which selected and formally approved Alternative 3 as "the alternative which will guide
7	federal dredged material disposal decisions in the San Francisco Bay for the next 50 years."
8	LTMS ROD at 2. The LTMS ROD states that Alternative 3 "is a long-term approach that
9	emphasizes beneficial reuse and ocean disposal of dredged material, with limited in-Bay
10	disposal," and that this alternative:
11	provides the greatest environmental benefit of the action alternatives because it has
12	the greatest amount of upland/wetland reuse for habitat restoration projects (which can benefit water quality, fish and wildlife habitat, and special status species) and
13	other projects such as levee maintenance or construction fill (which can have flood control benefits or reduce cumulative effects) In addition, Alternative 3 best
14	reflects national dredging policy as it encourages the beneficial reuse of dredged material as a resource.
15	LTMS ROD at 3-4. In 2001, the LTMS agencies adopted a Management Plan to implement
16	Alternative 3 as approved in the 1999 ROD.
17	Applicable Bay Plan Policies and Basin Plan Designated Beneficial Uses
18	53. In 2002, the Commission amended the Bay Plan to incorporate the LTMS goals and
19	policies, including maximizing beneficial reuse of dredged sediment.
20	a. Bay Plan Dredging Policy 5 provides in pertinent part that "dredging projects should
21	maximize use of dredged material as a resource consistent with protecting and enhancing Bay
22	natural resources, such as creating, enhancing, or restoring tidal and managed wetlands, creating
23	and maintaining levees and dikes, providing cover and sealing material for sanitary landfills, and
24	filling at approved construction sites." Bay Plan Dredging Policy 1 provides in pertinent part that
25	"[d]redging and dredged material disposal should be conducted in an environmentally and
26	economically sound manner. Dredgers should reduce disposal in the Bay and certain waterways
27	over time to achieve the LTMS goal of limiting in-Bay disposal volumes to a maximum of one

million cubic yards per year."

- b. Bay Plan Fish and Wildlife Policies 1 and 2 require protection of, and avoidance and minimization of harm to, Bay species listed as endangered or threatened under the federal or state ESAs and their habitat. *See also* Fish and Wildlife Policy 4 [projects that may result in a taking of an endangered or threatened species should not be authorized without the appropriate take authorization]; Bay Plan Subtidal Area Policy 1 [requiring projects in subtidal areas to minimize and, if feasible, avoid any harmful effects on Bay fish and wildlife]; Dredging Policy 2 [dredging should only be authorized where "important fisheries and Bay natural resources" are protected through "appropriate measures"]; Mitigation Policy 1 ["[p]rojects should be designed to avoid adverse environmental impacts to Bay natural resources," including fish and other aquatic organisms, wildlife, subtidal areas and tidal marshes].
- c. Bay Plan Water Quality Policy 2 provides that "[w]ater quality in all parts of the Bay should be maintained at a level that will support and promote the beneficial uses of the Bay as identified in the . . . Water Quality Control Plan, San Francisco Bay Basin."
- 54. In 2001, the Regional Board also adopted amendments to its San Francisco Bay Region Water Quality Control Plan (Basin Plan) to implement the LTMS goals and policies. The Basin Plan designates preservation of rare and endangered species, marine habitat, estuarine habitat, wildlife habitat, fish migration and fish spawning as beneficial uses of San Francisco Bay to be protected by specific water quality objectives. The designated beneficial uses and water quality objectives in the Basin Plan together constitute the federal CWA water quality standards for the Bay, which were approved by the Regional Board and EPA pursuant to section 303 of the CWA. 33 U.S.C. § 1313.
- 55. In April 2013, the LTMS agencies published a twelve-year report on implementation of the LTMS. The report concludes that: 1) beneficial reuse sites are available and need material; 2) the LTMS long-term target of a minimum of 40% beneficial reuse was slightly exceeded for the first twelve years of the program; and 3) the LTMS in-Bay volume disposal reduction targets also were met for each three-year increment of the transition period to achieve the LTMS long-term goal of a maximum of a maximum of 20% in-Bay disposal. LTMS 12-Year Review Report at 6, 9-10, 13.

1 2	Environmental Assessment/Environmental Impact Report on Corps' Maintenance Dredging of the Bay
3	56. In December 2014, the Corps and the Regional Board circulated for public comment a draft
4	environmental assessment/environmental impact report (EA/EIR) for Corps maintenance
5	dredging of the Bay's federal navigation channels for fiscal years 2015 through 2024. The Corps
6	and Regional Board published a final EA/EIR in April 2015. The EA/EIR states that the project
7	objectives are to: 1) provide safe, reliable and efficient navigation through federal channels in the
8	Bay in a feasible manner; 2) ensure consistency, to the maximum extent practicable, with the
9	goals of the LTMS program as described in the 1998 LTMS Final EIS/EIR and the 2001 LTMS
10	Management Plan; and 3) conduct dredging in a manner that adequately protects the environment
11	including listed species.
12	57. The EA/EIR acknowledges that, based on the 12-year review process for the LTMS
13	completed in 2013, the LTMS agencies have "concluded that the LTMS goals remain appropriate
14	and largely implementable, and that the program has been successfully implemented to date" and
15	"have recommended that the basic program continue." EA/EIR at 1-5. "This continuation
16	requires approximately 80 percent of dredged sediment to be targeted for beneficial reuse or out-
17	of-Bay disposal and only 20 percent targeted for in-Bay disposal." Id.
18	58. The EA/EIR states that the Corps will "beneficially reuse dredged material to the maximum
19	extent authorities allow." EA/EIR at ES-6, 2-19. The EA/EIR designated four in-Bay disposal
20	sites and three ocean disposal sites, including the San Francisco Deep Ocean Disposal Site as the
21	"Federal Standard" placement sites for the disposal of dredged material from the federal
22	navigation channels. The EA/EIR contains no analysis or documentation in support of the Corps'
23	designation of these in-Bay disposal sites. EA/EIR 1-33 – 1-35; 2-19 – 2-22. The EA/EIR also
24	discusses the capacity for beneficial re-use at a number of currently permitted and future
25	beneficial reuse sites. EA/EIR 1-35 – 1-39.
26	Adverse Impact of Corps' Hydraulic Dredges on Endangered and Threatened Delta Smelt and Longfin Smelt
27	and Dougin Smet

1	59. The EA/EIR states that, in 2011, "there were occurrences of delta smelt and longfin smelt
2	becoming entrained in [hydraulic] hopper dredging equipment during [Corps] maintenance
3	dredging at certain locations," and that entrainment of delta smelt and longfin smelt could
4	continue to occur during hydraulic dredging events. See EA/EIR at ES-2, ES-12; 1-2; 3.6-35 –
5	50. Fish that are entrained are also killed. Delta smelt is listed as a threatened species under the
6	federal ESA and an endangered species under the state ESA, and longfin smelt is a candidate for
7	listing under the federal ESA and is listed as threatened under the state ESA.
8	60. Both the federal and state ESAs prohibit governmental entities and other persons from
9	"taking," which includes killing, species listed as endangered or threatened under these statutes.
10	16 U.S.C. §§ 1532(19), 1538(a)(1)(B); Cal. Fish and Game Code §§ 86, 2080. The federal ESA
11	also prohibits the Corps from jeopardizing the continued existence of, or from adversely
12	modifying or destroying the designated critical habitat of, a federally-listed species. 16 U.S.C. §
13	1536(a)(2). In addition, Suisun Marsh and its channels and the Carquinez Strait are designated
14	critical habitat for the delta smelt. 59 Fed.Reg. 65256 (Dec. 19, 1994). Accordingly, the EA/EIS
15	evaluated as feasible alternatives two reduced hydraulic dredging alternatives to avoid or reduce
16	entrainment impacts to and take of these fish during Corps dredging operations. EA/EIR 2-24 –
17	2-26.
18	61. In 2013, the U.S. Army Engineer Research and Development Center prepared a modeling
19	study of entrainment of delta smelt and longfin smelt in hydraulic dredges in the Bay based on
20	data collected during Corps hydraulic dredging events in 2010 and 2011. The study estimated the
21	range of take from Corps hydraulic dredging in 2011 to be 394 to 3,694 delta smelt and 3,848 to
22	10,260 longfin smelt, depending upon the entrainment scenario modeled. Under the "high
23	entrainment scenario" modeled in that study, up to 29% of the median annual population
24	abundance of delta smelt, and up to 8% of the median annual population abundance of longfin
25	smelt, are estimated to be entrained (killed) annually by Corps hydraulic dredges.
26	62. On March 14, 2014, the California Department of Fish and Wildlife (CDFW) sent a letter to
27	Bruce Wolfe, Executive Officer of the Regional Board, in response to the Board's request for
28	information from CDFW regarding the significance of impacts to biological resources from the

1	Corps' dredging of the Bay's federal navigation channels. In that letter, CDFW states that the
2	Corps' dredging as proposed without restrictions on the use of hydraulic dredges "would
3	substantially reduce the number of" endangered and threatened fish species and cause significant
4	cumulative impacts to those species. Accordingly, CDFW recommended a reduction in hydraulic
5	dredging in the Bay to one channel inside the Bay per year.
6	USFWS and NMFS Biological Opinions for Corps' Bay Maintenance Dredging
7	63. On July 31, 2014, the United States Fish and Wildlife Service (USFWS) issued an annual
8	biological opinion regarding the impacts of the Corps' maintenance dredging on delta smelt in the
9	Suisun Channel. The USFWS estimated that a "medium" level take of delta smelt from the
10	Corps' hydraulic dredges would be a little over 1,000 delta smelt, but that this amount of take
11	would not jeopardize the continued existence of the species. The USFWS imposed a number of
12	conditions and restrictions on the timing and manner of use of the Corps' hydraulic dredges but
13	did not otherwise restrict the Corps' use of hydraulic dredges.
14	64. On January 16, 2015, the Corps requested consultation from the USFWS for ten years of
15	federal maintenance dredging activities in the Suisun Channel, using either a hydraulic or
16	mechanical dredge. On March 10, 2015, the USFWS requested additional information from the
17	Corps, and requested that the Corps reduce its request for consultation from a ten-year period to a
18	one-year period. On March 11, 2015, the Corps amended its request, limiting it to maintenance
19	dredging activities in Suisun Channel in 2015 using either a hydraulic or mechanical dredge. On
20	March 15, 2015, the Corps further amended its request, limiting the equipment to use of a
21	mechanical dredge between August 1 and November 30, 2015. On July 20, 2015, the USFWS
22	issued a second annual biological opinion for the Corps' maintenance dredging in Suisun
23	Channel, concluding that the estimated amount of take "will be minimal with the use of clamshell
24	dredging equipment during the work window in this drought year."
25	65. On or about July 7, 2016, the Corps submitted to the USFWS a revised biological
26	assessment and request for consultation for maintenance dredging in the Suisun Channel in 2016.
27	As in 2015, the Corps proposed to use only mechanical dredges in the Suisun Channel between
28	August 1 and November 30, 2016. The Corps' July 7, 2016 cover letter to the USFWS states that

1	"[o]ur revised project description is in response to discussions and email correspondence with the
2	USFWS during May and June 2016, whereby the USFWS presented new information indicating a
3	record low delta smelt population this year; expressed concern regarding the adverse effects of
4	proposed [hydraulic] dredging with estimates of potential take at approximately 1,400 that
5	equates to about 10 percent of the current population; and—in consideration of this extremely low
6	population and potential take level—recommended that the USACE change the project
7	description to clamshell dredging only." On August 18, 2016 the USFWS issued its third annual
8	biological opinion for the Corps' maintenance dredging in Suisun Channel, again concluding that
9	the estimated amount of take would be minimized due to the use of clamshell dredging equipment
10	during the work window of August 1 to November 30, 2016.
11	66. On July 9 and July 20, 2015, the National Marine Fisheries Service (NMFS) issued two
12	letters in response to the EPA's and the Corps' October 2014 request for re-initiation of
13	consultation on the LTMS Program pursuant to section 7 of the federal ESA (16 U.S.C. § 1536),
14	together which constitute NMFS' revised programmatic biological opinion for maintenance
15	dredging pursuant to the LTMS, including Federal Defendants' maintenance dredging activities.
16	The revised biological opinion generally limits maintenance dredging activities in the Bay to a
17	"work window" of December 1 to May 31, and provides that if dredging occurs outside of this
18	window, dredged material must be placed at a beneficial reuse site that will provide habitat
19	benefits for fish species, such as a tidal wetland restoration site. In its April 2015 Final EA/EIR,
20	the Corps indicated its intent to comply with this biological opinion. EA/EIR at ES-4 n. 6.
21	Corps' Consistency Determination for Bay Maintenance Dredging and Commission Conditional Concurrence in that Determination
22	Conditional Concurrence in that Determination
23	67. In February 2015, the San Francisco District of the Corps submitted to the Commission a
24	consistency determination in connection with its proposal to conduct annual maintenance
25	dredging of deep draft navigation channels in the Bay in fiscal years 2015 through 2024. The
26	Corps submitted a revised consistency determination to the Commission in March and
27	supplemental information in April 2015 following Commission staff's request on February 18,
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## Case 3:16-cv-05420 Document 1 Filed 09/22/16 Page 21 of 40

1	2015 to reduce the period of the consistency determination to three years and for additional
2	information (hereafter "Consistency Determinations").
3	68. The Consistency Determinations designated seven unconfined in-Bay and ocean disposal
4	sites as the Federal Standard placement sites, but also identified a number of currently available
5	and future beneficial reuse sites. See March 2015 Consistency Determination at 20-25. However,
6	the Consistency Determinations proposed that up to 48% of the dredged materials be disposed of
7	in the Bay and up to 55% of the materials be disposed of at the San Francisco Deep Ocean
8	Disposal Site. The Consistency Determinations did not commit to any specific amount of
9	beneficial reuse. The Consistency Determinations also contained no prohibitions on the use of
10	hydraulic dredges, which EA/EIR documented kill delta smelt, longfin smelt and other native fish
11	species. March 2015 Consistency Determination at 28-31, 40, 48; April 2015 Consistency
12	Determination Addendum at 33-34, 37, 43-44.
13	69. At its June 4, 2015 meeting, the Commission conditionally concurred in the Corps'
14	Consistency Determinations. The Commission memorialized these conditions in a June 15, 2015
15	Letter of Agreement to the Corps. <sup>2</sup> The Commission's Letter of Agreement included a number of
16	special conditions designed to ensure full consistency with specific, enforceable policies of the
17	Bay Plan, including but not limited to Dredging Policies 1 and 5, Fish and Wildlife Policies 1 and
18	2 and Water Quality Policy 2, as well as the McAteer-Petris Act. These conditions include
19	requirements that:
20	a. Beginning in 2017, the Corps must comply with, <i>inter alia</i> , Bay Plan Dredging
21	Policies 1 and 5 to maximize the beneficial reuse of dredged sediment as a resource by meeting
22	the LTMS goals that a minimum of 40% of the dredged material be beneficially reused for
23	wetland restoration and other beneficial projects and that a maximum of 20% of dredged material
24	be disposed of in the Bay (Special Condition II.B hereafter the "40% beneficial reuse"
25	condition);
26	<sup>2</sup> Pursuant to Federal Defendants' requests in August and December of 2015 and May and

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<sup>&</sup>lt;sup>2</sup> Pursuant to Federal Defendants' requests in August and December of 2015 and May and June of 2016, the Commission supplemented and amended the June 15, 2015 Letter of Agreement on September 4, 2015, and February 12, May 10 and July 12, 2016. However, none of these amendments modified any of the Contested Conditions.

- b. Beginning in federal fiscal year 2017, the Corps must use a maximum of one hydraulic dredge in either the Richmond Out Harbor or Pinole Shoal channel in order to protect delta smelt and longfin smelt and their habitat as required by, *inter alia*, Bay Plan Fish and Wildlife Policies 1 and 2 (Special Condition II.J.2.a -- hereafter the "reduced hydraulic dredging" condition);
- c. Within three months of the Commission's conditional concurrence in the Consistency Determinations, the Corps must develop and implement a strategy to obtain additional funds to implement the 40% beneficial reuse and reduced hydraulic dredging conditions. Beginning in July 2015, and every quarter thereafter, the Corps was required to report to the Commission and LTMS agencies on the Corps' efforts and progress in securing additional funding to satisfy the 40% beneficial reuse and reduced hydraulic dredging conditions (Special Condition II.K); and
- d. At least thirty days prior to commencement of any dredging episode authorized by the Commission's conditional concurrence, the Corps must submit to the Commission's Executive Director a water quality certification, waste discharge requirements or any other required approvals from the Regional Board, as required by Bay Plan Water Quality Policy 2. The Corps' failure to obtain such certification prior to the commencement of any dredging episode would terminate the Commission's concurrence for that episode (Special Condition II.D). <sup>3</sup>
- 70. On June 23, 2015, defendant Morrow signed the June 15, 2015 conditional concurrence Letter of Agreement on behalf of the Corps.

## Regional Board's Section 401 Certification for Corps Bay Maintenance Dredging

71. On May 13, 2015, the Regional Board issued a CWA Section 401 Water Quality Certification for the Corps' maintenance dredging of the federal navigation channels in San Francisco Bay from 2015 through 2019. Provision 10 of the Water Quality Certification, similar to the Commission's special condition II.J.2.a, limits the Corps' use of a hydraulic dredge to the Main Ship Channel (outside of the Bay) and one other in-Bay channel (either the Richmond Outer

<sup>&</sup>lt;sup>3</sup> As noted, Special Conditions II.B, II.D, IIJ.2.a and II.K in the Commission's June 15, 2015 conditional concurrence Letter of Agreement are collectively referred to herein as the "Contested Conditions."

1	Harbor or Pinole Shoal Channel), commencing in federal fiscal year 2017. Regional Board Order
2	No. R2-2015-0023, pp. 22-23.
3	Corps' Objections to Commission's Conditional Concurrence and Regional Board's Section 401 Certification and State Agencies' Response to Objections
5	72. In a letter dated November 10, 2015 from defendant Morrow on behalf of the Corps to
6	Commission Executive Director Lawrence Goldzband, the Corps rescinded its June 23, 2015
7	agreement to the Commission's June 15, 2015 conditional concurrence in the Corps' maintenance
8	dredging program for the Bay and objected to Special Conditions II.B, II.J.2.a and II.K in the
9	Commission's June 15, 2015 Letter of Agreement.
10	73. The Corps' November 10, 2015 objection letter states that the 40% beneficial reuse and
11	reduced hydraulic dredging conditions (Special Conditions II.B and II.J.2.a) "exceed the
12	constraints established by" the so-called "Federal Standard" policy governing Corps dredging
13	projects, citing 33 C.F.R. § 336.1(c)(1). This section provides in pertinent part that: "[i]t is the
14	Corps' policy to regulate the discharge of dredged material from its projects to assure that the
15	dredged material disposal occurs in the least costly, environmentally acceptable manner,
16	consistent with engineering requirements established for the project." 33 C.F.R. § 336.1(c)(1).
17	74. Federal Defendants' position is that it allegedly would cost more to comply with the 40%
18	beneficial reuse and reduced hydraulic dredging conditions, and therefore they are legally
19	prohibited from implementing these conditions, based on the claimed Federal Standard
20	requirement that the Corps adopt the "least costly" alternative. However, Federal Defendants
21	have not documented to the Commission the specific additional costs of implementing the
22	Contested Conditions and the unavailability of funds in the Corps' budget to cover these
23	additional costs. Rather, Federal Defendants simply assert that they are without authority to
24	implement any conditions, which may increase the overall costs of dredging, on account of the
25	"Federal Standard." Moreover, as discussed below, the Corps' proposed Federal Standard
26	Alternative (as set forth in their Consistency Determinations) conflicts with the CZMA and other
27	federal laws and the Corps Dredging Regulations and does not satisfy the "environmentally
28	acceptable" requirement of the Federal Standard.

75. With respect to the requirement to seek additional funding in Special Condition II.K, the
Corps' November 10, 2015 letter states that the Corps is not authorized to seek special additional
funding for state conditions which merely implement "a state's own local preference." Rather,
the letter states, the Corps is only authorized to seek additional funding in a few extreme cases,
such as projects affecting national security or interstate navigation. Federal Defendants further
assert that neither of these circumstances applies to Corps' maintenance dredging of the Bay.
Therefore, the Corps claims to lack authority to comply with Special Condition II.K. As support
for this contention, the Corps relies primarily on an October 21, 2015 internal memorandum
interpreting the Federal Standard in the Corps Dredging Regulations. The letter further states that
the Corps would only agree to implement Special Conditions II.B and II.J.2.a if the Commission
or another state agency agreed to pay for the unspecified and undocumented increased costs of
implementing these conditions.
76. Finally, the Corps' November 10, 2015 letter to the Commission states that "[e]ven without
Special Conditions II.B, J.2.a and K, it remains [the Corps'] position that the dredging program is
fully compliant with the legally enforceable action items of the Bay Plan and that [the
Commission's] conditional concurrence continues to be valid."
77. Federal Defendants have not made any efforts to seek additional funding to implement
Special Conditions II.B and II.J.2.a as required by Special Condition II.K, including but not
limited to the requirements to "develop and implement" a funding strategy within three months of
the Commission's July 15, 2015 Letter of Agreement and to report on a quarterly basis "to the
Commission and its LTMS partners" on Federal Defendants' "efforts, progress and proposed
future efforts to secure funding for" Special Conditions II.B and II.J.2.a, commencing in July
2015.
78. In another letter dated November 10, 2015 from defendant Morrow on behalf of the Corps
to Regional Board Executive Officer Bruce Wolfe, the Corps objected to the Regional Board's
CWA Section 401 Water Quality Certification for the Corps' maintenance dredging of the Bay.
Specifically, the Corps objects to Provision 10 of the Regional Board's Water Quality
Certification that, like the Commission's Special Condition II.J.2.a, requires the Corps to reduce

1	its use of hydraulic dredges in the Bay commencing in federal fiscal year 2017 in order to protect
2	endangered and threatened delta smelt and longfin smelt.
3	79. The Corps' letter to the Regional Board cites the same reasons for the Corps' refusal to
4	comply with Provision 10 as it does for its refusal to comply with the Commission's Special
5	Conditions II.J.2.a and II.K in its June 15, 2015 conditional concurrence, as specified in
6	paragraphs 73-75 above. The Corps' November 10, 2015 letter to the Regional Board goes even
7	further however, by stating that "in the event the [Regional] Board does not amend the 401
8	Certification to remove Provision 10, we will have no choice but to defer dredging of the
9	navigation channels to which this Provision applies."
10	80. The Corps' November 10, 2015 letter to the Regional Board objecting to the Regional
11	Board's Water Quality Certification, and its accompanying refusal to comply with that
12	certification, also constitutes a <i>de facto</i> objection to Special Condition II.D in the Commission's
13	June 15, 2015 Letter of Agreement. This condition requires the Corps to obtain (and by
14	implication, comply with) a valid Section 401 Water Quality Certification from the Regional
15	Board prior to the commencement of any dredging episode.
16	81. In a detailed letter to Jeffrey Payne, the Director of OCM, and defendant Morrow dated
17	March 10, 2016, Commission Executive Director Larry Goldzband explained why the state
18	objected to Federal Defendants' interpretation of the CZMA and the Corps Dredging Regulations
19	including the "Federal Standard," and why Federal Defendants are not legally prohibited from
20	implementing, and are required to comply with, the Contested Conditions. The Commission's
21	March 10, 2016 letter also requested that, pursuant to the CZMA regulations, 15 C.F.R. Part 930,
22	Subpart G, the OCM mediate the dispute.
23	82. By letter dated March 22, 2016, from defendant Morrow to Jeffrey Payne and Larry
24	Goldzband, the Corps declined to participate in mediation, stating that it "is unable to mediate on
25	the [F]ederal [S]tandard, which is a federal regulatory requirement."
26	83. In a detailed letter to defendant Morrow dated March 10, 2016, Regional Board Executive
27	Officer Bruce Wolfe explained why Federal Defendants' interpretation of the CWA and the
28	Corps Dredging Regulations, including the "Federal Standard," is incorrect and why Federal

Defendants legally are required to comply with Provision 10 in the Regional Board's Water
Quality Certification. Federal Defendants did not respond to that letter.
FIRST CAUSE OF ACTION (Violation of the CZMA and APA) (Against All Defendants)
84. The Commission hereby re-alleges and incorporates by reference Paragraphs 1 through 83
of this complaint as though these paragraphs were fully set forth herein.
85. The CZMA provides that "[e]ach Federal agency activity within the coastal zone that
affects any land or water use or natural resource of the coastal zone shall be carried out in a
manner which is consistent to the maximum extent practicable with the enforceable policies of
the approved State management programs." 16 U.S.C. § 1456(c)(1)(A); see also 15 C.F.R. §§
930.30, 930.39(c). "Federal agency activities" are all activities initiated by a federal agency
(except those involving issuance of a federal license or permit to a person or the granting of
federal assistance to an applicant) "when coastal effects are reasonably foreseeable." 15 C.F.R. §
930.31(a).
86. The CZMA regulations define "consistent to the maximum extent practicable" as "fully
consistent with the enforceable policies" of the state's costal program "unless full consistency is
prohibited by existing law applicable to the Federal agency." 15 C.F.R. § 930.32(a)(1). Federal
Defendants' maintenance dredging of federal navigation channels in the Bay is a federal agency
activity that directly and indirectly affects uses of land and water and natural resources in the
coastal zone. This activity therefore must be carried out in a manner which is consistent to the
maximum extent practicable with the enforceable policies of the Commission Program (the San
Francisco Bay Segment of California's federally-approved state coastal program). Thus, Federal
Defendants are required to submit a consistency determination to the Commission for the Corps'
maintenance dredging of the federal navigation channels of the Bay. 16 U.S.C. § 1456(c)(1)(C);
15 C.F.R. § 930.36(b)(1). Federal Defendants submitted to the Commission an initial consistency
determination in March 2015 and a supplemental and revised consistency determination in April

2015 for their maintenance dredging activities from 2015-2017.

1	87. Under the CZMA regulations, a state coastal agency may conditionally concur in a federal
2	agency's consistency determination. 15 C.F.R. § 930.4(a)(1). In such circumstances, the state
3	coastal agency "shall include in its concurrence letter the conditions which must be satisfied." Id.
4	The Commission issued such a conditional concurrence letter to federal defendants on June 15,
5	2015 and defendant Morrow signed the letter on behalf of the Corps on June 23, 2015.
6	88. The CZMA regulations provide that the federal agency must "immediately notify" the state
7	coastal agency "if the State agency's conditions are not acceptable." 15 C.F.R. § 930.4(a)(2).
8	Federal Defendants violated this requirement by accepting the Commission's conditions on June
9	23, 2015, and then waiting nearly five months to notify the Commission on November 10, 2015
10	that they are instead objecting to and refusing to comply with the Contested Conditions.
11	89. The CZMA regulations further provide that a federal agency's refusal to comply with a
12	state coastal agency's conditional concurrence in the proposed federal agency activity shall be
13	treated as a state agency objection to that activity. 15 C.F.R. § 930.4(b); see also § 930.4(a)(1).
14	Federal Defendants' letters dated November 10, 2015 to the Commission and the Regional Board
15	objecting to the Contested Conditions and their March 22, 2016 letter to the Commission refusing
16	to engage in mediation constitute formal notification to the Commission that the Contested
17	Conditions are not acceptable to Federal Defendants and that they will not comply with the
18	Contested Conditions. As such, pursuant to 15 C.F.R. § 930.4(b), the Commission's June 15,
19	2015 conditional concurrence Letter of Agreement must be treated as an objection to Federal
20	Defendants' maintenance dredging of the Bay's federal navigation channels.
21	90. The CZMA regulations only permit a federal agency to proceed with a federal agency
22	activity to which a state coastal agency has objected if it makes one of the following findings: 1)
23	the federal agency activity "is fully consistent with the enforceable policies of the [state coastal]
24	management program," notwithstanding the state agency's objection; or 2) full consistency "is
25	prohibited by existing law applicable to the Federal agency and the Federal agency has clearly
26	described, in writing, to the State agency the legal impediments to full consistency." 15 C.F.R. §
27	930.43(d).

1	91. Compliance with the Contested Conditions is necessary to ensure full consistency with
2	specific enforceable policies of the Bay Plan, including but not limited to Bay Plan Dredging
3	Policies 1-3 and 5, Bay Plan Fish and Wildlife Policies 1 and 2, Bay Plan Subtidal Area Policy 1,
4	Bay Plan Mitigation Policy 1 and Bay Plan Water Quality Policy 2, and the specific enforceable
5	policies of the McAteer-Petris Act, Cal. Gov. Code §§ 66600-66605, 66663.1, 66663.2. Both the
6	Bay Plan and McAteer-Petris Act are part of the San Francisco Bay Segment of California's
7	federally-approved state coastal program. These enforceable policies require: 1) beneficial reuse
8	of dredged sediment as a resource to the maximum extent practicable for wetlands restoration,
9	shoreline resiliency and other beneficial purposes; 2) minimization of unconfined in-Bay disposal
10	of dredged sediment; 3) avoidance of harm to listed species and their habitat; and 4) protection of
11	Bay water quality, including designated beneficial uses. The Contested Conditions ensure
12	compliance with these enforceable policies.
13	92. Any maintenance dredging of the federal navigation channels of the Bay that is conducted
14	absent compliance with, or in violation of, the Contested Conditions and pursuant to Federal
15	Defendants' Consistency Determinations (their purported Federal Standard Alternative) will not
16	ensure that any beneficial reuse of sediment will occur and that in-Bay disposal of sediment is
17	minimized, and will result in take of listed Bay fish species and destruction of their habitat, which
18	are designated beneficial uses of the Bay. Maintenance dredging that is conducted absent
19	compliance with, or in violation of, the Contested Conditions and pursuant to Federal Defendants'
20	Federal Standard Alternative is therefore not fully consistent with the enforceable policies of the
21	Commission Program and is unlawful.
22	93. Accordingly, Federal Defendants cannot lawfully find that conducting maintenance
23	dredging of the federal navigation channels of the Bay absent compliance with the Contested
24	Conditions and pursuant to their purported Federal Standard Alternative is fully consistent with
25	the enforceable policies of the Commission Program. Federal Defendants' contrary finding in
26	their November 10, 2015 letter to the Commission is arbitrary, capricious, an abuse of discretion
27	and otherwise not in accordance with the CZMA and its implementing regulations. For the
28	reasons alleged in paragraph 94 below, Federal Defendants also cannot lawfully find that they are

- 1 legally prohibited from being fully consistent with the Commission Program. Therefore, Federal 2 Defendants cannot lawfully find that they are consistent to the maximum extent practicable with 3 the Commission Program. 4 94. Federal Defendants' findings in their November 10, 2015 letters to the Commission and the 5 Regional Board stating that they are legally prohibited from achieving full consistency with the 6 Commission Program and from implementing the Contested Conditions on account of their 7 increased cost also are arbitrary, capricious, an abuse of discretion and otherwise not in 8 accordance with the CZMA and its implementing regulations for the following reasons: 9 The CZMA regulations state that "whenever legally permissible, Federal agencies a. 10 shall consider the enforceable policies of [state coastal] management programs as requirements to 11 be adhered to in addition to existing Federal agency statutory mandates." 15 C.F.R. § 12 930.32(a)(2). The CZMA regulations also include requirements for federal agencies to seek 13 additional funding to cover the cost of complying with additional state requirements imposed under the CZMA. Under the CZMA, "[t]he only circumstance where a Federal agency may rely 14 15 on a lack of funding as a limitation on being fully consistent with an enforceable policy is the Presidential exemption" set forth in 16 U.S.C. § 1456(c)(1)(B). 15 C.F.R. § 930.32(a)(3). No 16 17 such Presidential exemption has been applied for or obtained. Moreover, even a Presidential 18 exemption may not be granted "on the basis of a lack of appropriations unless the President has 19 specifically requested such appropriations as part of the budgetary process, and the Congress has 20 failed to make available the requested appropriations." 16 U.S.C. § 1456(c)(1)(B). 21 h. The CZMA regulations further provide that: 22 Federal agencies shall not use a general claim of a lack of funding or insufficient appropriated funds or failure to include the cost of being fully consistent in Federal 23 budget and planning processes as a basis for being consistent to the maximum extent practicable with an enforceable policy of a management program. . . . In cases where 24 the cost of being consistent with the enforceable policies of a management program was not included in the Federal agency's budget and planning processes, the Federal 25 agency should determine the amount of funds needed and seek additional federal funds. 26
  - 15 C.F.R. § 930.32(a)(3).

- c. Absent a clear statutory prohibition, Federal Defendants cannot legally rely on a federal regulatory policy and a non-binding internal guidance memorandum interpreting that regulatory policy as a justification for refusing to comply with the CZMA's clear statutory directive that each federal agency ensure that its activities are consistent with a federally-approved state coastal program to the maximum extent practicable. Federal Defendants cannot lawfully interpret the "Federal Standard," which is a federal regulatory policy, in a manner that trumps the clear statutory commands of the CZMA.
- d. Even assuming Federal Defendants could rely on the Federal Standard policy to trump the CZMA's clear statutory command and that their interpretation of the Federal Standard is correct, there is nothing in the Corps Dredging Regulations or any other statute or regulation that requires Federal Defendants to only implement the least-cost alternative or that legally prohibits Federal Defendants from implementing a more costly alternative, as is necessary in order for Federal Defendants to lawfully conclude that such alternative is impracticable under the CZMA. 15 C.F.R. § 930.32(a).
- e. In fact, as further alleged in paragraph 99 below, the Corps Dredging Regulations require Federal Defendants to: 1) "make all reasonable efforts to comply with" state coastal programs; 2) cooperate with the state to achieve consistency with state coastal programs; 3) accommodate the state's concerns to the extent practicable; 4) "attempt to comply with any reasonable requirement imposed by a state" pursuant to the CZMA; and 5) prepare a report to upper management seeking additional funding to meet state-imposed conditions when any disagreements between the Corps and the state cannot be resolved. 33 C.F.R. §§ 336.1(c)(10), 336.2(a)(2), 337.2(a)-(b), 337.8.
- f. Federal Defendants have not documented that the Contested Conditions will actually cost more to implement and if so, how much more. Nor have Federal Defendants established that this additional cost renders the dredging impracticable. In fact, Federal Defendants' previous statements and actions since the Corps' adoption of the LTMS ROD in 1999 indicate that Federal Defendants' compliance with the 40% beneficial reuse and reduction of hydraulic dredging conditions are feasible and otherwise practicable, and are not legally prohibited by the Federal

1 Standard or any other federal statute, regulation or policy. See e.g., Final EA/EIR, pp. ES-2, ES-4, ES-6, ES-9—ES-11, 1-4 – 1-5, 1-35 – 1-39, 3.6-35 -- 50; March 2015 Consistency 2 3 Determination, pp. 22-25; NMFS letters to Corps and EPA, July 9 and July 20, 2015; LTMS 12-4 Year Review Final Report, Apr. 2013, pp. 4, 6, 9-10, 13; Regional Board letter to Corps, Mar. 10, 5 2016 at p. 2 n.3; Corps letter to USFWS, July 7, 2016. In sum, Federal Defendants cannot lawfully find that they are legally prohibited by 6 g. 7 any existing law or regulation from complying with the Contested Conditions (Special Conditions 8 II.B, II.D, II.J.2.a and II.K) in the Commission's June 15, 2015 conditional concurrence Letter of 9 Agreement. Federal Defendants are legally required to implement these conditions by the CZMA 10 and its implementing regulations, as well as the Corps Dredging Regulations, as further alleged in 11 paragraphs 99 and 100 below. Accordingly, for all of the foregoing reasons, Federal Defendants' 12 conclusion that they are legally prohibited from complying with the Contested Conditions is 13 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. 14 Unless Federal Defendants are required to conduct maintenance dredging and manage 15 dredged material in compliance with the Contested Conditions and are enjoined from conducting 16 dredging under their purported Federal Standard Alternative as set forth in their Consistency 17 Determinations, the Commission will be irreparably injured and harmed in that dredging absent 18 compliance with the Contested Conditions and pursuant to the purported Federal Standard 19 Alternative will irreparably harm and injure the land and water uses and natural resources of the 20 Bay, in contravention of the enforceable policies of the Commission Program and the 21 requirements of the CZMA and its implementing regulations. 22 96. In addition, the Commission will be irreparably injured and harmed because its ability to 23 carry out the enforceable policies of the Commission Program with respect to Federal 24 Defendants' maintenance dredging activities will be seriously undermined and impaired, contrary 25 to the requirements of the CZMA and its implementing regulations. The Commission has no 26 adequate remedy at law for the injury and harm Federal Defendants will cause, and only the 27 Court's exercise of its equitable powers can require Federal Defendants to conduct maintenance 28 dredging and manage dredged material in compliance with the Contested Conditions.

1	97. An actual controversy exists between the Commission and Federal Defendants in that the
2	Commission contends that the CZMA and its implementing regulations require Federal
3	Defendants to comply with the Contested Conditions, whereas Federal Defendants contend that
4	the Corps Dredging Regulations legally prohibit such compliance. A judicial declaration of the
5	rights and obligations of the parties accordingly is appropriate in this case pursuant to 28 U.S.C.
6	2201(a). The Commission is entitled to a declaration that the CZMA and its implementing
7	regulations and the Corps Dredging Regulations require Federal Defendants to comply with the
8	Contested Conditions, and that Federal Defendants cannot conduct maintenance dredging and
9	manage dredged material in the Bay absent compliance with these conditions and under their
10	purported Federal Standard Alternative.
11	SECOND CAUSE OF ACTION
12	(Violation of 33 C.F.R. Parts 335-338 and APA) (Against All Defendants)
13	
14	98. The Commission hereby re-alleges and incorporates by reference Paragraphs 1 through 97
15	of this complaint as though these paragraphs were fully set forth herein.
16	99. Federal Defendants' decision that they are legally prohibited from complying with the
17	Contested Conditions and that they can only legally dredge in accordance with their Consistency

99. Federal Defendants' decision that they are legally prohibited from complying with the Contested Conditions and that they can only legally dredge in accordance with their Consistency Determinations (their purported Federal Standard Alternative) is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the Corps Dredging Regulations, 33 C.F.R. Parts 335-338, for the following reasons:

a. The Federal Standard in the Corps Dredging Regulations upon which Federal Defendants rely is not limited to cost considerations, but also requires their maintenance dredging activities and management of dredged material to be conducted in an "environmentally acceptable manner." *See* 33 C.F.R. §§ 335.4, 336.1(c)(1). In order for the dredging to be deemed "environmentally acceptable," it must meet the federal criteria for discharge of dredged and fill material under the CWA section 404(b)(1) Guidelines and any additional requirements imposed pursuant to the CZMA, section 401 of the CWA, the ESA and other applicable federal environmental laws. 33 C.F.R. §§ 335.2, 335.7, 336.1(a), (b)(4), (b)(8)-(9), (c)(1)-(11).

maintenance dredging of the federal navigation channels of the Bay is done in an

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"environmentally acceptable manner" that meets the CWA Section 404(b)(1) Guidelines and applicable Commission Program policies that are federally enforceable under the CZMA. Specifically, the Contested Conditions ensure that dredged sediment is reused for wetlands restoration, shoreline resiliency and other beneficial reuse projects in and around the Bay; that dredging does not result in the take of federally- and state-listed endangered and threatened fish species; and that dredging protects water quality, including designated beneficial uses, in the Basin Plan, as required by the CWA Section 404(b)(1) Guidelines and enforceable policies of the Commission Program.

The Contested Conditions are designed to ensure that Federal Defendants'

- c. Federal Defendants' decision to conduct maintenance dredging absent compliance with the Contested Conditions and pursuant to their Consistency Determinations (their purported Federal Standard Alternative) does not constitute an environmentally acceptable alternative within the meaning of the Corps Dredging Regulations. Such dredging by definition constitutes a violation of the CWA Section 404(b)(1) Guidelines, as further described and alleged in paragraph 100 below, as well as of the enforceable policies of the state's coastal program, as described and alleged in paragraphs 91-94 above, and consequently cannot satisfy the Federal Standard's "environmentally acceptable" requirement.
- d. The Corps Dredging Regulations also require Federal Defendants to "provide to the state information addressing why the alternative which represents the Federal Standard is environmentally acceptable." 33 C.F.R. § 337.2(b). Federal Defendants have not documented that their purported Federal Standard Alternative meets the "environmentally acceptable" criterion of the Corps Dredging Regulations, nor have they documented that their designated "Federal Standard placement sites" for each deep draft federal navigational channel in the Bay in fact constitutes an appropriate "environmentally acceptable" "Federal Standard" disposal site under the Corps Dredging Regulations. Federal Defendants' EA/EIR and Finding of No Significant Impact for the EA/EIR do not satisfy the requirement in the Corps Dredging

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27 28 requirements "cannot reasonably be accommodated," then Federal Defendants may temporarily defer dredging and prepare a report to upper management. 33 C.F.R. § 337.2(b). The report may

be prepared in any situation where the state objects to a consistency determination. 33 C.F.R. §

- e. In fact, Federal Defendants' purported Federal Standard Alternative is not an "environmentally acceptable" alternative authorized by the Corps Dredging Regulations because it does not meet the requirements of either the CWA Section 404(b)(1) Guidelines or the CZMA, as further alleged in paragraphs 91-94 above and paragraph 100 below.
- f. The Corps Dredging Regulations expressly require Federal Defendants to comply with the CZMA's requirement to ensure that their dredging activities comply with the enforceable policies of the state's coastal program to the maximum extent practicable, and to obtain and comply with a CWA Section 401 water quality certification for discharges of dredged or fill material into waters of the United States. 33 C.F.R. § 336.1(a); see also 33 C.F.R. § 336.1(b)(8)-(9), (c)(1)-(3), (10). These regulations also require Federal Defendants to: 1) "make all reasonable efforts to comply with" federally-approved state coastal programs and state water quality standards; 2) "cooperate to the maximum extent practicable with state agencies" to achieve consistency with state coastal programs and prevent violation of state water quality standards; 3) "attempt to comply with any reasonable requirement imposed by a state" pursuant to the CZMA and CWA section 401; and 4) "accommodate the state's concerns to the extent practicable." 33 C.F.R. §§ 336.1(c)(10), 336.2(a)(2), 337.2(a)-(b). Federal Defendants' refusal to comply with the Contested Conditions, and decision to adopt their purported Federal Standard Alternative instead, violates these requirements.

Like the CZMA regulations, the Corps Dredging Regulations also include

with additional state requirements imposed under the CZMA. For example, in the event that "the

state agency imposes conditions or requirements" which in Federal Defendants' opinion "exceed

those needed to meet the Federal Standard," and Federal Defendants conclude that these

requirements for Federal Defendants to seek additional funding to cover the cost of complying

- 337.8(a)(6). The report must include, *inter alia*, the economic need for the dredging, the estimated costs of the state agency requirements which exceed those necessary to meet the Federal Standard, and other information necessary to assist in a determination "whether to further defer the dredging and seek Congressional appropriations for the added expense." 33 C.F.R. § 337.8(b); *see also* 33 C.F.R. § 336.1(b)(9)(v).
- h. Contrary to the statements in Federal Defendants' November 10, 2015 letters to the Commission and Regional Board and their October 21, 2015 internal memorandum, these provisions are not limited to situations affecting national security or interstate navigation. Even if they were so limited, dredging of the federal navigation channels of the Bay clearly affects interstate navigation, and therefore any dispute involving the conditions necessary for dredging of the federal navigation channels of the Bay triggers the requirement in the Corps Dredging Regulations to prepare the report to upper management and seek additional funding. *See* April 2015 Consistency Determination Addendum at 24-26. In sum, Federal Defendants' own regulations do not allow them to simply refuse to comply with state conditions that are alleged to cost more than Federal Defendants' claimed Federal Standard Alternative. Rather, Federal Defendants must prepare a report to upper management documenting and seeking additional funding for the claimed additional costs.
- i. Contrary to the statements in Federal Defendants' November 10, 2015 letters to the Commission and Regional Board and their October 21, 2015 internal memorandum, the Corps Dredging Regulations do not allow Federal Defendants to shift to the Commission or any other state entity the incremental cost, if any, of state-imposed conditions, which are authorized by federal law, related to the method or manner of dredging or to the location of disposal areas. Rather the regulations only permit such cost-shifting as to additional state monitoring or testing requirements. 33 C.F.R. § 337.2(b)(1).
- j. With regard to the location of disposal areas, the Corps Dredging Regulations simply provide that "the added Federal cost of providing these disposal areas will affect the priority of performing dredging on that project" and that the additional costs "may cause the project to become economically unjustified." 33 C.F.R. § 337.2(b)(2); *see also* 33 U.S.C. § 2211(b)(1)

(providing that the federal share of the costs of operating and maintaining a federal harbor navigation project is 100%). Furthermore, these provisions only apply if additional federal funds are not obtained pursuant to the report procedure set forth in section 337.8 of the regulations, as alleged above.

- k. For all the foregoing reasons, Federal Defendants' interpretation of the Federal Standard, as reflected in their November 10, 2015 letters to the Commission and the Regional Board and October 21, 2015 internal memorandum, and their consequent refusal to comply with the Contested Conditions, blatantly misinterprets and conflicts with the plain language, structure and intent of the Corps Dredging Regulations and conflicts with several federal statutes, including the CZMA. Therefore, Federal Defendants' current interpretation is not entitled to any deference and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. 100. Federal Defendants' decision that maintenance dredging of the Bay's federal navigational channels pursuant to their Consistency Determinations and absent compliance with the Contested Conditions is the only alternative that meets the Federal Standard is also arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law because their purported Federal Standard Alternative does not meet the stringent federal criteria for discharge of dredged and fill material under the CWA Section 404(b)(1) Guidelines, as required by the Corps Dredging Regulations (33 C.F.R. §§ 335.2, 335.7, 336.1(a), (b)(4), (c)(1)-(2)), for the following reasons:
- a. Federal Defendants' Federal Standard Alternative violates the discharge prohibitions of the Section 404(b)(1) Guidelines, which *inter alia*, prohibit discharges that jeopardize the continued existence of any species listed as endangered or threatened under the federal ESA, or which significantly adversely affect the aquatic ecosystem or fish, shellfish and wildlife and their various life stages. 40 C.F.R. §§ 230.10(b)(3), (c)(2)-(3), 230.12(a)(3)(ii). The Section 404(b)(1) Guidelines specifically state that "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on aquatic ecosystem." 40 C.F.R. § 230.10(d); *see also* § 230.12(a)(3)(iii). The Section 404(b)(1) Guidelines also prohibit discharges that are not in compliance with a state's federally-approved water quality standards. 40 C.F.R. 230.10(b)(1).

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- b. The Basin Plan's federally-approved water quality standards require protection of federally- and state-listed endangered and threatened fish species and other fish species native to the Bay and their habitat. Dredging with a hydraulic dredge, which Federal Defendants admit kills federally- and state- listed Delta smelt and longfin smelt, violates these discharge prohibitions of the Section 404(b)(1) Guidelines.
- c. The Section 404(b)(1) Guidelines further prohibit discharges "if there is a practicable alternative to the proposed discharge which would have [a] less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a); see also § 230.12(a)(3)(i). "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). The analysis of alternatives in a document prepared under the National Environmental Policy Act "will in most cases provide the information for the evaluation of alternatives" required under the Guidelines. 40 C.F.R. § 230.10(a)(4). Finally, if a federally-approved coastal program or other planning process, such as the LTMS, has "identified and evaluated" practicable alternatives, "such evaluation shall be considered" by the federal agency "as part of the consideration of alternatives under the Guidelines." 40 C.F.R. § 230.10(a)(5).
- d. The Contested Conditions constitute a less environmentally damaging "practicable alternatives" under the foregoing provisions of the Section 404(b)(1) Guidelines, which Federal Defendants are required to implement. Federal Defendants' EA/EIR for maintenance dredging of the Bay's federal navigation channels evaluated two reduced hydraulic dredging alternatives as feasible alternatives, Federal Defendants committed to comply with any hydraulic dredging restrictions and beneficial reuse requirements imposed by NMFS in its reinitiated programmatic biological opinion for the LTMS and by the USFWS in its annual biological opinions for 2015 and 2016, and Federal Defendants previously committed to the minimum 40% beneficial reuse and maximum 20% in-Bay disposal goals in the LTMS and again in the 12-year report on implementation of the LTMS. The Commission's reduced hydraulic dredging and 40% beneficial reuse conditions also constitute practicable alternatives because they are designed to meet the enforceable policies of the Commission Program as well as the LTMS Program. Dredging

conducted absent compliance with the contested conditions and according to Federal Defendants' Federal Standard Alternative therefore violates the requirement in the Section 404(b)(1) Guidelines that Federal Defendants implement less environmentally damaging practicable alternatives to their proposed discharge.

capricious, an abuse of discretion and otherwise not in accordance with the law. 101. Unless Federal Defendants are required to conduct maintenance dredging and manage dredged material in compliance with the Contested Conditions and are enjoined from conducting dredging under their purported Federal Standard Alternative as set forth in their Consistency Determinations, the Commission will be irreparably injured and harmed in that dredging absent compliance with the Contested Conditions and pursuant to the purported Federal Standard Alternative will irreparably harm and injure the land and water uses, fish and wildlife and other natural resources and water quality of the Bay, contrary to the requirements of the Corps 102. In addition, the Commission will be irreparably injured and harmed because its ability to

carry out its mission and duties to protect the land and water uses, fish and wildlife and other natural resources and water quality of the Bay with respect to Federal Defendants' maintenance dredging activities will be seriously undermined and impaired, contrary to the requirements of the Corps Dredging Regulations. The Commission has no adequate remedy at law for the injury and harm Federal Defendants will cause, and only the Court's exercise of its equitable powers can require Federal Defendants to conduct maintenance dredging and manage dredged material in compliance with the Contested Conditions.

103. An actual controversy exists between the Commission and Federal Defendants in that the Commission contends that the Corps Dredging Regulations require Federal Defendants to comply with the Contested Conditions, whereas Federal Defendants contend that these regulations legally prohibit such compliance. A judicial declaration of the rights and obligations of the parties

accordingly is appropriate in this case pursuant to 28 U.S.C. § 2201(a). The Commission is entitled to a declaration that the Corps Dredging Regulations require Federal Defendants to comply with the Contested Conditions, and that Federal Defendants cannot conduct maintenance dredging and manage dredged material in the Bay absent compliance with these conditions and under their purported Federal Standard Alternative.

### PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against Federal Defendants as follows:

- A. For a declaration that the CZMA and its implementing regulations and the Corps

  Dredging Regulations require Federal Defendants to conduct maintenance dredging of the federal navigation channels of the Bay and manage associated dredged material in compliance with the Contested Conditions and prohibit Federal Defendants from conducting such dredging pursuant to their purported Federal Standard Alternative;
- B. For a declaration that Federal Defendants' purported Federal Standard Alternative and associated refusal to comply with the Contested Conditions violates the CZMA and its implementing regulations and the Corps Dredging Regulations and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law;
- C. For a declaration that Federal Defendants' interpretation of the Federal Standard in the Corps Dredging Regulations, as set forth in their November 10, 2015 letters to the Commission and the Regional Board and the Corps' October 21, 2015 internal guidance memorandum, violates the CZMA and its implementing regulations and the Corps Dredging Regulations and is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law.
- D. For temporary, preliminary and permanent injunctive relief requiring Federal

  Defendants and any persons acting on their behalf to conduct maintenance dredging of the federal
  navigation channels of the Bay and manage associated dredged material in compliance with the

  Contested Conditions, and prohibiting Federal Defendants from conducting maintenance
  dredging and managing associated dredged material pursuant to their purported Federal Standard

  Alternative;

# Case 3:16-cv-05420 Document 1 Filed 09/22/16 Page 40 of 40

1	E. For an order, declaration, and jud	Igment that Federal Defendants' Federal Standard
2	Alternative for maintenance dredging of the federal navigation channels of the Bay must be an	
3	alternative that complies with the San Francisco Bay segment of California's federally-approved	
4	state coastal program, the CZMA and its implementing regulations, the Corps Dredging	
5	Regulations, and other applicable laws.	
6	F. For costs of suit incurred, including reasonable attorneys' fees; and	
7	G. For such other relief as the court deems just and proper.	
8	Dated: September 22, 2016	Respectfully submitted,
9 10		KAMALA D. HARRIS Attorney General of California
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12		/s/ Tara L. Mueller
13		Deputy Attorney General  Attorneys for Plaintiff San Francisco Bay
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		Complaint for Declaratory and injunctive Keller